STATE OF MICHIGAN

COURT OF APPEALS

ANGELA LOCKETT-STARKS and MARTIN STARKS, Plaintiffs-Appellees, v WEISSMAN, GITLIN, HERKOWITZ, M.D., P.C., DR. MARTIN L. WEISSMAN, LAWRENCE KURZ, M.D., JEFFREY S. FISCHGRUND, M.D., and RAJAB NEDAM, Defendants, and CHARLES MIRISCIOTTI, Defendant-Appellant.	UNPUBLISHED March 10, 2005 No. 250948 Oakland Circuit Court LC No. 2002-041263-NO

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

Defendant Charles Mirisciotti (defendant) appeals by leave granted from an order of the trial court denying his motion for summary disposition. This negligence case arose out of an alleged sexual molestation perpetrated by Rajab Nedam on plaintiff Angela Lockett-Starks (plaintiff) during a physical therapy massage. At the time of the incident, Nedam was employed at Weissman, Gitlin, Herkowitz, M.D., P.C. (the clinic) as a physical therapy aide. Defendant, a vocational rehabilitation consultant, recommended Nedam for the position. We reverse and remand.

In November 1997, Rajab Nedam was involved in an automobile accident and sustained a closed head injury. Nedam was a licensed medical doctor in Afghanistan.[1] During his rehabilitation, his outpatient treatment management team determined that Nedam would

[1] Nedam came to the United States in 1994 and attained United States citizenship after his accident.

probably no longer be able to work as a physician, but they concluded that employment would promote his recovery. Thus, defendant was retained to assist in finding employment for Nedam consistent with Nedam's desire to continue working in the medical field.

Defendant found an opening for a physical therapy aide at the clinic. Defendant was not told that Nedam would be massaging patients, but he explained that this information would not necessarily have affected his decision to recommend Nedam for the position. Defendant testified that he sought approval of the placement from Nedam's management team and that they felt it was a great opportunity. Defendant recommended Nedam for the position.

Midge Moran, the clinic's physical therapy supervisor, testified that defendant disclosed the information about Nedam's closed head injury. Moran explained that she was hesitant about Nedam's ability to perform the job but that defendant assured her that Nedam would be a good candidate. In March 1999, the clinic hired Nedam as a physical therapy aide. Although Moran explained that she initially relied heavily on defendant's assurances, she independently determined that Nedam was able to perform the job after he was hired.

On December 2, 1999, Nedam was assigned to perform massage therapy on plaintiff. In her complaint, plaintiff alleged that Nedam touched her in a sexually inappropriate manner during the massage. Plaintiff further alleged that Nedam had "a history of a closed head injury and past incidents of molesting patients" and that it was negligent for defendant to place Nedam in the position as a physical therapy aide given this knowledge.

Defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing, in part, that defendant had no legal duty to plaintiff. Defendant asserted that the exception to the duty requirement, which applies where there is a special relationship, did not apply because there was no special relationship present among the pertinent individuals, and even if there was, plaintiff was not a party to whom a foreseeable danger was readily identifiable. Defendant argued that plaintiff had failed to present a genuine issue of material fact regarding defendant's knowledge of Nedam's alleged criminal tendencies. More specifically, defendant argued that plaintiff failed to produce any evidence to support a conclusion that Nedam's closed head injury or his angry behavior with his family members put defendant on notice that Nedam would commit a sexual assault. Plaintiff countered that she had in fact presented evidence to support Nedam's propensity for sexually inappropriate behavior. Plaintiff pointed specifically to Dr. Martin L. Weissman's deposition, in which he testified that he told plaintiff that "after [he] had talked to [his] attorney, [the] attorney then talked to [the attorney's] wife who . . . said that she had a similar experience whereby Mr. Nedam, instead of asking [her] to lower her pants some more, actually pulled the underpants lower, . . . which [Weissman] felt was improper." Plaintiff also contended that there was a special relationship between defendant and Nedam by virtue of defendant's work with Nedam and his familiarity with Nedam's medical and psychological history. Plaintiff asserted that defendant knew or should have known of Nedam's aggressive behavior. Further, plaintiff pointed out that defendant knew about yet another complaint of inappropriate sexual behavior occurring in the spring of 2000.

The trial court denied summary disposition, holding that it could not "rule out the possibility that a duty could arise in this context" and also finding that defendant had not eliminated all factual issues regarding proximate cause.

On appeal, defendant first argues that the trial court erred in denying his motion for summary disposition because plaintiff failed to establish that any special relationship existed among the pertinent individuals that imposed a duty on defendant to protect plaintiff from the sexual molestation. We agree.

We review de novo a trial court's ruling with regard to a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Determination of the existence of duty is a question of law subject to de novo review. *Fultz v Union-Commerce Associates*, 470 Mich 460, 463; 683 NW2d 587 (2004). Where, as here, the trial court grants a motion for summary disposition under both MCR 2.116(C)(8) and (C)(10), and it is clear that the court looked beyond the pleadings, we will treat the motion as having been granted under (C)(10), which tests whether there is factual support for a claim. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). Under MCR 2.116(C)(10), a party may move for dismissal of a claim based on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. When reviewing the motion, the court must consider all the documentary evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); see also MCR 2.116(G)(5).

To establish a prima facie case of negligence, a plaintiff must prove, as a threshold matter, that there was a duty owed by the defendant to the plaintiff. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Generally, there is no duty that obligates one person to protect another against the acts of a third person unless there is a special relationship between the defendant and the plaintiff or the defendant and the third person. *Murdock v Higgins*, 454 Mich 46, 54; 559 NW2d 639 (1997). The rationale for imposing such a duty is premised on the defendant's control; the question is whether the plaintiff entrusted himself to "the control and protection of the defendant, with a consequent loss of control to protect himself." *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). Duty depends in part on foreseeability, i.e., whether it was foreseeable that the defendant's conduct would create a risk of harm and whether the result of that conduct and intervening causes was foreseeable. *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977). The plaintiff must also be readily identifiable as foreseeably endangered; there is no duty owed to an unforeseeable plaintiff. *Murdock v Higgins*, 208 Mich App 210, 214-215; 527 NW2d 1 (1994); *Balcer v Forbes*, 188 Mich App 509, 512; 470 NW2d 453 (1991).

A mental health professional has a statutory duty to protect a "reasonably identifiable third person" from a patient who communicates to him a threat of physical violence that he has the "apparent intent and ability to carry out in the foreseeable future[.]" MCL 330.1946(1); see also *Swan v Wedgewood Christian Youth & Family Services, Inc*, 230 Mich App 190, 196; 583 NW2d 719 (1998). It is also possible that a comparable common law duty may be recognized. *Swan*, *supra* at 200. However, plaintiff's complaint does not allege that a duty was imposed on defendant in his capacity as a psychologist, but rather merely as a vocational counselor. There is no existing or well-established special relationship between a vocational counselor and a rehabilitation client or between the counselor and parties with whom the rehabilitated person would have reasonably foreseeable contact. The question, then, is whether a particular special relationship can be inferred under the circumstances of this case. We conclude that it cannot. Indeed, the element of foreseeability is lacking.

In plaintiff's complaint, the key allegation is that defendant "had knowledge of Mr. Rajab Nedam's . . . past incidents of molesting patients." However, plaintiff failed to present any evidence that would create a genuine issue of disputed fact regarding whether defendant knew of any alleged past incidents of Nedam molesting patients. Plaintiff continues to rely on the complaint of inappropriate sexual behavior in the spring of 2000, but the trial court correctly ruled that any conduct that occurred after the incident involving plaintiff was irrelevant to the issue of defendant's duty and knowledge before the incident. Also, plaintiff relies on the alleged incident with the wife of Weissman's attorney. However, in his deposition, Weissman explained that the woman never reported the incident.

Plaintiff also asserts that a special relationship should be recognized in this case because defendant had an eighteen-month relationship with Nedam and was well aware of his violent tendencies with his wife. In support of her contentions, plaintiff submits numerous reports prepared by defendant, in which he clearly conveys his knowledge of Nedam's anger issues. According to plaintiff, in light of defendant's knowledge, "it was quite foreseeable that some type of improper activity could take place in the workplace." Plaintiff further points out that defendant visited Nedam at the job site to check on Nedam's progress, and after briefly closing his file on Nedam, he reopened it due to concerns about Nedam's ongoing difficulties at home.

Although defendant knew that Nedam would be working with patients, the record does not support a conclusion that Nedam posed a threat of sexual abuse. Indeed, the record is completely lacking in support for a conclusion that before the incident Nedam had any propensity toward sexually inappropriate behavior. It is true that defendant was admittedly concerned about Nedam's anger problems. Nonetheless, nothing in defendant's reports suggests that any risk of any type of physical abuse had shifted to Nedam's place of employment. To the contrary, defendant states several times in his reports that Nedam's personal problems had not affected his work performance. Also, although defendant did relate that on two occasions Nedam became angry with a co-worker, there is no indication that Nedam became, or threatened to become, physically violent. In fact, Nedam removed himself from the situation on each occasion in order to calm down. There is no indication in the record that Nedam had the apparent intent to carry out in the foreseeable future any threat of physical abuse, let alone sexual abuse, in his place of employment.

Accordingly, we conclude that the trial court erred in denying defendant summary disposition.[2] No existing or well-established special relationship existed, and plaintiff failed to

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[2] In rendering its decision, the trial court concluded, in part, that it was "not willing to rule out the possibility that a duty could arise in this context." Ordinarily, whether a duty exists is a question of law for the court, and if there is no duty, summary disposition is proper. *Howe v Detroit Free Press, Inc*, 219 Mich App 150, 156; 555 NW2d 738 (1996). "However, if there are factual circumstances that give rise to the duty, the existence of those facts must be determined by a jury." *Id*. Arguably, the court made the aforementioned statement because it believed that certain facts remained to be resolved regarding the existence of the duty. We note, however, that while courts should be liberal in finding a genuine issue of material fact, *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 320; 575 NW2d 324 (1998), modified on other

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establish that a special relationship should be imposed under the circumstances because she failed to present any facts that could create a genuine question of material fact regarding whether it was foreseeable that Nedam would sexually molest plaintiff.

Defendant also argues that the trial court erred in denying defendant's motion for summary disposition because plaintiff failed to establish that there was proximate cause between the alleged breach of duty and the sexual molestation. We need not address this issue because of our conclusion that no duty existed. *Buczkowski v McKay*, 441 Mich 9, 98; 490 NW2d 330 (1992). In any event, for the reasons set forth above, we agree with defendant that the knowledge he possessed regarding Nedam did not make it reasonably foreseeable that sexual molestation could result. Like duty, proximate cause depends in part on foreseeability. As stated in *Babula v Robertson*, 212 Mich App 45, 53; 536 NW2d 834 (1995), quoting *Moning, supra* at 439, "'[t]he questions of duty and proximate cause are interrelated because the question whether there is the requisite relationship, giving rise to a duty, and the question whether the cause is so significant and important to be regarded a proximate cause both depend in part on foreseeability.'" Plaintiff failed to present any facts that could create a genuine question of material fact regarding whether it was foreseeable that Nedam would sexually molest plaintiff.

Reversed and remanded for entry of an order granting summary disposition to defendant. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Richard A. Bandstra
/s/ Stephen L. Borrello

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grounds by *Harts v Farmers Ins Exchange*, 461 Mich 1; 597 NW2d 47 (1999), it is no longer sufficient for a plaintiff to promise to offer factual support for his claims at trial. *Smith v Globe Life Ins, Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999).